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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-968

POPULAR SCIENCE PUBLISHING COMPANY, INC.,
Appellant,

vs.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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Popular Science Publishing Company, Inc. ("Popular Science") opposes the motion to dismiss or affirm filed by the Board of Equalization of the State of California ("Board") for the reasons set forth in Popular Science's Jurisdictional Statement and on additional grounds set forth below.

POPULAR SCIENCE'S ACTIVITIES WITHIN THE STATE OF CALIFORNIA DO NOT PROVIDE SUFFICIENT NEXUS TO SUPPORT THE IMPOSITION OF USE TAX LIABILITY ON UNRELATED MAIL ORDER TRANSACTIONS.

This Court recently held that California could constitutionally impose use tax collection liability on a mail order seller which maintained two offices within the state even though there was no relationship between

the offices and the mail order sales which the state sought to tax. *National Geographic Society v. California State Board of Equalization,* No. 75-1868 (decided April 4, 1977).

In so holding, this Court expressly refused to endorse the "slightest presence" standard of constitutional nexus espoused by the Supreme Court of California. Slip Opinion at 5. The Court found it unnecessary to decide the constitutionality of that standard since the National Geographic Society's maintenance of two offices and solicitation by employees assigned to these offices of advertising copy in the range of one million dollars annually established "a much more substantial presence that the expression 'slightest presence' connotes." Slip Opinion at 5.

The Court thus left open the question of what threshold level of instate activity is required to provide a constitutional nexus for use tax collection liability. However, the Court did make clear that the line lies somewhere between cases in which the seller's only connection with customers in the taxing state is by common carrier or through the mail (*National Bellas Hess v. Department of Revenue,* 386 U.S. 735 (1967)) and cases such as *National Geographic,* where the seller maintained two offices within the state staffed by eight employees who solicited nearly one million dollars a year in advertising copy. Indeed, the Court reaffirmed *Miller Bros. Co. v. Maryland,* 347 U.S. 340 (1954), which held that the taxing state could not constitutionally impose use tax collection liability even where the out-of-state seller delivered goods by truck into the taxing state, advertised in media which reached residents of the taxing state, and supplemented those advertisements with flyers mailed directly to customers in the taxing state. Slip Opinion at 7-8.

It is respectfully submitted that the activities of Popular Science in California were so insubstantial and totally unrelated to the sales which the state is seeking to tax that dismissing or affirming the instant appeal would in effect endorse and confirm the slightest presence test.

The Board implicitly recognized the weakness of the slightest presence test by going outside of the record to paint a distorted picture of the nature and extent of Popular Science's activities within the state.

As set forth more fully in the Jurisdictional Statement, the only basis upon which the state could assert liability for use tax collection on Popular Science was the activity of two travelling salesmen who solicited sales of unrelated products. Throughout its Motion to Dismiss or Affirm, the Board erroneously characterized the presence of the salesmen as "maintaining offices within California" apparently in an effort to buttress its claim that Popular Science received benefits from the state sufficient to justify the imposition of use tax liability. (See, *e.g.,* Motion to Dismiss or Affirm, pp. 8, 11-12, 15, 16).[1]

In one passage, which can only charitably be described as misleading, the Board asserts that Popular Science "has been able to establish and maintain employee staffed offices throughout the state from which

[1]The Board argues that Popular Science's activities in California bring it within the coverage of Section 6203(a) of the Revenue and Taxation Code. Section 6203(a) provides that a "retailer engaged in business in this state" includes "any retailer maintaining, occupying or permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business." As noted above, the stipulated facts in this case do not support the Board's position.

to solicit sales revenues for the Magazine." Motion to Dismiss or Affirm, page 15. In fact, that assertion is not and cannot be supported by the record in this case.

Indeed, it is directly contradicted by the facts set out in the Board's own Motion to Dismiss or Affirm under the caption "The Facts" at pages 2-5.

The stipulated facts on which this case was tried do not show that Popular Science during the period in question maintained an office or held any tangible or real property in California during the period in question. Nor did its two salesmen solicit advertising for the Magazine or promote mail order sales for any products sought to be taxed in this case. Their sole function was to solicit orders for audiovisual products completely unrelated to the mail order sales of books which the state seeks to tax.

The Board attempts to bolster its nexus argument by contending that Popular Science has directly exploited the California market by means of mail order advertisements in the magazine and announcements mailed to California subscribers. These mailings and all other contact with customers were, as the Board conceded in its Motion to Dismiss or Affirm and the Stipulation of Facts on which the case was tried, made solely through the instrumentalities of interstate commerce from outside the state. Thus, these contacts cannot be described as instate activity. Moreover, these advertisements were directed at subscribers, wherever

located, and only incidentally reached customers having addresses in California.

Furthermore, while the Court held in *National Geographic* that the absence of a relationship between the activity of the seller sought to be taxed and the seller's activity within the state does not bar the imposition of use tax liability, the Court did not rule out "dissociation" as a factor in the qualitative and quantitative examination of local activity to determine the existence of a taxable nexus.

It is respectfully urged that where, as in the instant case, an out-of-state seller's instate activities are both insubstantial and completely unrelated to the transactions sought to be taxed, no taxable nexus exists. As applied here, California's "slightest presence" test would permit the state to impose a use tax on unrelated sales even though Popular Science did not benefit from the panoply of municipal services provided to the Society's offices in *National Geographic*.

It is urged that a decision by the Court to decline jurisdiction, or alternatively, to affirm based on a finding of taxable nexus in this case, would extend *National Geographic* to approve the slightest presence test *sub silentio*. The perpetuation of such a rule would create unreasonable and stifling burdens on interstate commerce. With such a rule, business could not engage in normal interstate travel and communications into and with foreign states without exposing themselves to the possibility of penalties, such as those imposed in the

instant case, in the form of retroactive assessments of use tax liability on unrelated out-of-state transactions involving persons using addresses in the foreign state. The Board has not shown any benefit to the State that will balance the detrimental chilling effect of such a rule.

Conclusion.

It is difficult to imagine a case posing in bolder relief the dangers of the "slightest presence" test put forward by the Supreme Court of California. This Court should strike down that test—a step found unnecessary in *National Geographic, supra.*

Therefore, it is respectfully urged that the Court note probable jurisdiction to define clearly the requirements for a showing of taxable nexus in a case involving minimal instate activity, or in the alternative, that the decision below be summarily reversed.

Respectfully submitted,

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